## SUMMARY OF THE CASE

This case involves a claim for breach of a fiduciary duty and the proper remedy associated with such a claim. Larry and Julie Goodnight and Lindy and Shannon Bostic were equal shareholders in Goodnight Farms, Inc. After a disagreement about the management of the business, the parties ceased conducting business together. Thereafter, the Bostics brought suit against Larry Goodnight. The Bostics alleged that Goodnight had breached his fiduciary duty to the corporation and requested money damages.

The trial court permitted the jury to consider the breach of fiduciary duty claim and to award damages on that claim. The court then conducted an accounting and awarded damages on the same claim.

On appeal, Goodnight contends that the Bostics had an adequate remedy at law, and that the trial court erred when it awarded damages for a cause of action previously considered by a jury and conducted a one-sided accounting.

Because resolution of this matter will require this court to consider whether the District Court disregarded Goodnight's Constitutional right to a jury trial and whether the Arkansas Court of Appeals has ignored controlling United States Supreme Court case law, an oral argument is necessary. This case warrants twenty minutes of oral argument.

# CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant, Goodnight Farms, Inc., makes the following disclosures:

1. Goodnight Farms, Inc., does not have a parent corporation.
2. Goodnight Farms, Inc., is not a publicly held corporation.
3. There are no publicly held corporations owning 10% or more of the stock in Goodnight Farms, Inc.

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## JURISDICTIONAL STATEMENT

Pursuant to 28 U.S. C. § 1331, the District Court had subject-matter jurisdiction over this case. Specifically, Plaintiffs, Lindy "Bud" and Shannon Bostic, asserted that Defendant, Larry Goodnight, violated Sections 10(b) and 20 of the Securities Exchange Act of 1934 and Rule 10b-5 as promulgated by the Securities Exchange Commission. Pursuant to 28 U.S.C. § 1367, the District Court had supplemental subject-matter jurisdiction over the remaining claims of fraud, deceit, breach of fiduciary duty, and corporate waste raised in the Plaintiffs' Complaint.

The United States Court of Appeals for the Eighth Circuit has jurisdiction over this case pursuant to 28 U.S.C. § 1291. Specifically, this is an appeal from the District Court's March 18, 2005 order denying Defendants' request to amend its findings of fact and conclusions of law, denying Defendants' motion for a new trial, and denying Defendants' motion to alter or amend the judgment.

On March 31, 2005, Larry Goodnight and Goodnight Farms, Inc. filed their timely notice of appeal seeking review of the District Court's March 18, 2005 order. The order appealed from is a final order that disposes of all claims raised by all parties.

## STATEMENT OF ISSUES PRESENTED

I. Whether the judgment of the district court violated Goodnight's Constitutional right to a jury trial. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894 (1962); *Bradshaw v. Thompson*, 454 F.2d 75 (6th Cir. 1972).

a. Whether the Bostics waived their right to equitable relief by submitting the derivative action claim to the jury.

II. Whether the district court erred in holding that Goodnight was not entitled to an accounting, and was therefore not entitled to any credits in the accounting. *Tankersley v. Patterson*, 176 Ark. 1013, 5 S.W.2d 309 (1928); *Wester v. S. Seattle Land Co.*, 174 Wash. 276, 24 P.2d 633 (1933); *Fincham v. A.U. Pinkham & Co.*, 133 Wash. 517, 233 P. 913 (1925).

a. Whether the district court misunderstood the holding of *A&P's Hole In One, Inc. v. Moskip*, 38 Ark. App. 234, 832 S.W.2d 860 (1992).

b. Whether *A&P's Hole-In-One* is constitutionally sound. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894 (1962).

III. Whether the accounting taken in this case was fatally flawed, because the district court did not undertake any actions other than reviewing the same trial testimony presented to the jury, did not grant a reference to a master, and did not make findings of fact on credits and debits. *Walters-Southland Inst. v. Walker,* 217 Ark. 602, 323 S.W.2d 448 (1950); *Whann v. Doell*, 192 Cal. 680, 221 P. 899 (1923).

## STATEMENT OF THE CASE

On January 27, 2003, Lindy "Bud" Bostic and Shannon Bostic (hereinafter "Bostics") filed a Complaint against Larry Goodnight (hereinafter "Goodnight") and Goodnight Farms, Inc. (hereinafter "Goodnight Farms") in the United States District Court for the Eastern District of Arkansas. The Complaint asserted securities fraud, common law fraud, and deceit. The Bostics, as shareholders in Goodnight Farms, also alleged a derivative action claim against Goodnight for breach of fiduciary duty. The Bostics sought legal and equitable relief in their Complaint.

On April 11, 2003, the Bostics amended their Complaint. On April 30, 2003, Goodnight and Goodnight Farms answered the Bostics' Complaint and asserted a Counterclaim against the Bostics. The Counterclaim alleged breach of contract and conversion. In addition to compensatory damages, the Counterclaim requested an equitable accounting of the books and records of Goodnight Farms.

On July 26, 2004, the Bostics once again amended their Complaint. Defendants filed a timely response to the Second Amended Complaint.

A jury trial was held in this case in October of 2004. After the testimony of numerous witnesses, and the admission of voluminous exhibits, the jury retired to consider the claims. The jury found for Plaintiffs on their deceit claim and their breach of fiduciary duty claim. The jury awarded $0 in damages to the Bostics on both claims. The jury found in favor of Goodnight on the securities fraud claim and on his counterclaim for breach of contract. The jury awarded $0 in damages to Goodnight.

On December 6, 2004, the court entered a Judgment outlining the jury's findings. On the same day, the court issued Findings of Fact and Conclusions of Law. In its order, the court reviewed the Bostics' breach of fiduciary duty claim previously considered by the jury, concluded that Goodnight had breached his fiduciary duty, awarded the Bostics $870,708.81 in damages, and denied Goodnight's request for an accounting.

Thereafter, Goodnight filed a motion seeking to amend the trial court's findings of fact and conclusions of law and requesting a new trial. In an order issued March 18, 2005, the trial court denied Goodnight's motions. On March 31, 2005, Goodnight and Goodnight Farms filed their Notice of Appeal challenging the district court's orders. This appeal followed.

## STATEMENT OF FACTS

### *The Parties*

Plaintiff, Goodnight Farms, Inc. (herein after "Goodnight Farms") is an Arkansas corporation formed by Defendant, Larry Goodnight (hereinafter "Goodnight"), and his wife, Julie Goodnight, in 2000.[1] (R. 131). The primary purpose of Goodnight Farms was to purchase cattle, grow and feed the livestock, and then resell the cattle at premium prices. (R. 891). In the spring of 2000, Goodnight and Plaintiff, Lindy "Bud" Bostic, discussed the possibility of going into the cattle business together. (R. 919-21). Rather than establishing a new corporation, the parties decided that Mr. Bostic and his wife, Plaintiff Shannon Bostic, would purchase a fifty percent interest in Goodnight Farms. The parties agreed that the purchase price for that fifty percent ownership interest in Goodnight Farms would be $114, 649.00, which then represented fifty percent of the value of the corporation. (R. 923). The Goodnights and the Bostics were to be equal owners of Goodnight Farms. (R. 925).

In the summer of 2000, the Bostics paid Goodnight $80,000.00 and contributed some equipment to Goodnight Farms. Under the stock purchase

[1] Plaintiffs also made Goodnight Farms a nominal defendant with the filing of their Complaint and subsequent amendments. (App. A 1, 2, 5). Goodnight believes Goodnight Farms' participation as a Defendant is truly nominal, however, and will therefore refer to Goodnight Farms as a Defendant throughout this brief.

agreement, this left an unpaid balance of $31,000.00 to Goodnight. (R. 536, 926-27).

In January of 2001, the Bostics were issued 1000 shares of stock in Goodnight Farms, representing their fifty percent ownership interest. (R. 414). Goodnight served as the president of Goodnight Farms, Bud Bostic served as vice-president, Shannon Bostic acted as secretary, and Julie Goodnight was the treasurer. (R. 96, 553, 562). There were never any other shareholders in Goodnight Farms. At all times, Shannon Bostic, a bookkeeper, maintained the financial records and accounts for Goodnight Farms. (R. 611, 836).

After the Bostics acquired their interest in Goodnight Farms, the business decided to purchase property and construct a new office building. The Bostics and the Goodnights personally guaranteed a loan to First State Bank for the purchase of the property and the construction of an office. (R. 538, 542). Bud Bostic's other business, B&L Drywall, was in charge of the construction project. (R. 538). The parties established a new business entity known as B&G Rentals, which owned the real property and appurtenance, and rented the office building to Goodnight Farms. (R. 538).

***A Disagreement Arises***

In 2002, after having disagreements about how to manage the corporation, the Goodnights and the Bostics decided to dissolve Goodnight Farms. (R. 944-47).

On January 27, 2003, the Bostics filed a Complaint against Larry Goodnight and Goodnight Farms, asserting securities fraud, common law fraud, and deceit. (App. A 1, 2, 5).[2] Goodnight Farms, through the Bostics, also asserted a derivative action against Goodnight for breach of fiduciary duty. (App. A 1, 2, 5). Specifically, Goodnight Farms alleged that Goodnight, as president, had breached his fiduciary duties to the company by commingling corporate funds and personal funds and by misappropriating corporate funds. (App. A 1, 2, 5). Plaintiffs prayed for an award of money damages and an injunction requiring an accounting of corporate funds.[3] (App. A 1, 2, 5).

On April 30, 2003, Goodnight and Goodnight Farms responded to the Bostics' Complaint, and Goodnight asserted a Counterclaim against the Bostics. (App. A 3, 6). The Counterclaim alleged causes of actions for breach of contract and conversion. (App. A 3, 6). Mr. Goodnight and Goodnight Farms also requested that "the court, in its equitable jurisdiction over the proceeding, appoint a master for an accounting of the books and records of Goodnight Farms and B&G Rentals from July 6, 2000 to date." (App. A 6, at ¶ 28). Defendants explained that

[2] The Bostics amended their Complaint on April 11, 2003, and again on July 26, 2004. (App. A 2, 5).

[3] The Complaint and subsequent amendments itemized several causes of action and prayed for a monetary judgment, an accounting, and fees and costs. The Complaint, however, did not identify which relief requested was based upon which particular cause of action. The omnibus prayer apparently covered all causes of action pleaded. (App. A 1, 2, 5).

"the accounting for all transactions, assets, and liabilities of Goodnight Farms is complicated and in dispute." (App. A 6, at ¶ 27). No master was appointed by the trial court to conduct an accounting of Goodnight Farms' assets before or after the trial. (*See* R.).

***The Trial Begins***

This case came on for a six-day trial beginning on October 4, 2004. During the trial, Allison Smith, a certified public accountant, testified about the financial records of Goodnight Farms. She explained that Shannon Bostic was the corporate bookkeeper for Goodnight Farms and that Mrs. Bostic used an accounting program to manage the financial records for the corporation. (R. 832-33). In her management of the corporation's financial records, Mrs. Bostic reviewed checks written from the corporate account and determined whether they were for personal or corporate expenses. (R. 836). Additionally, Ms. Smith testified about the circumstances surrounding corporate funds being deposited into Goodnight's personal account. (R. 839-43).

Plaintiffs and Defendants put on all of their evidence, and all causes of action were then submitted to a jury. (R. 1051). Prior to submitting the case to the jury, however, the trial court found that portions of the Bostics' derivative claim were equitable in nature, because the relief sought was an accounting. Thus, the trial court concluded that the court, rather than the jury, should consider the breach of fiduciary duty claim. (R. 770, 874, 975). Oddly enough, the court decided to give the fiduciary duty claim to the jury and permitted the jury to assess damages. The court also determined that it would separately assess damages against Goodnight for "self-dealing." (R. 971-75). Mr. Goodnight's attorney objected and argued that this determination would be akin to submitting the same claim to the judge and the jury, that the jury would be confused, and that such an action could result in a duplication of damages assessed against Goodnight. (R.970-74).

Over Goodnight's objection, the trial court submitted the breach of fiduciary duty claim to the jury and instructed the jury to award damages for everything but "self-dealing." (R. 1006-08). The court did not at any time define "self-dealing" or instruct the jury on what that term meant. (*See* R.). There was no separate action pleaded by Plaintiffs for "self-dealing," and, indeed, Plaintiffs' counsel admitted that "self-dealing" was just part of the breach of fiduciary duty derivative claim. (R. 770) (App. A 14).

***Verdict and an Accounting***

After deliberation, the jury returned verdicts in favor of the Bostics on their deceit claim and breach of fiduciary duty claim. The jury found for Goodnight on Plaintiffs' securities fraud claim, and on his counterclaim. The jury awarded the Bostics and Goodnight Farms $0 in damages on both the deceit claim and the breach of fiduciary duty claim. (App. A 8).

Following the trial, the court used the jury's finding of a breach of fiduciary duty to separately assess damages based upon an "accounting." (App. A 9, 10). The trial court, however, took no additional testimony, held no additional hearings, and did not appoint a master or expert to review the corporate books and records. (*See* R.). On December 6, 2004, the trial court issued an order concluding: (1) that Goodnight was a fiduciary; (2) that Goodnight failed to present clear, distinct, and accurate accounts demonstrating the accounts of the corporation were properly handled; (3) that Goodnight did not present evidence that demonstrated that certain expenditures were for the benefit of the corporation as opposed to his personal cattle business; (4) that Goodnight was not entitled to an accounting on his counterclaim; and (5) that the Bostics were entitled to judgement in the amount of $870,708.81. (App. A 9). The court did not present in its order a list of the items included in the accounting, the parties' relative positions with respect to including or excluding those particular items, or the court's finding on each item. (App. A 9, 10).

Thereafter, Goodnight filed a motion seeking to amend the trial court's Findings of Fact and Conclusions of Law and requesting a new trial. In an order issued March 18, 2005, the trial court denied Goodnight's motions. (App. A 11). On March 31, 2005, Larry Goodnight and Goodnight Farms filed their Notice of Appeal challenging the district court's orders. (App. A 12).

## SUMMARY OF THE ARGUMENT

Appellants Larry Goodnight and Goodnight Farms, Inc. challenge the trial court's order permitting an accounting of Goodnight Farms on three general bases. The first challenge requires a reversal and dismissal of the accounting. The second and third challenges are in the alternative, and require reversal of the accounting and a remand for further proceedings before Judge Moody. This appeal involves issues of Constitutional significance, as well as further definition from the Court of Appeals on the requisites for conducting a proper accounting.

Appellants first believe that that they were deprived of their Constitutionally-protected right to a trial by jury when the court essentially overturned and nullified the jury's verdict of $0 in favor of Appellees by conducting a post-trial accounting based upon the exact same claims submitted to the jury. Appellants also believe that by submitting their claims to the jury, Appellees waived any right to a post-trial accounting because the relief sought from the jury and by an accounting was the same award of money damages based upon the same conduct.

In the alternative, Goodnight believes that the trial court made an error as a matter of law when it held that, because Goodnight was not entitled to an accounting, he was not entitled to have any credits in his favor considered during the accounting that was conducted. Many courts have held that an accounting is a two-step process: first, the court decides if an accounting is appropriate, and second, the court takes the account. Once the court determines an accounting is warranted, all items belonging in the account must be considered, and the party moving for the accounting tacitly agrees to pay any balance due from him or her, if such is determined. Despite this rule of law, the trial court excluded any items from the accounting in favor of Goodnight. Goodnight believes this error of law stems from a misunderstanding by the trial court of Arkansas precedent, which is no longer in accordance with United States Supreme Court dictates.

Finally, and again in the alternative, Goodnight believes that the procedure used by the trial court for taking the account was fatally flawed. If the accounting was taken because, according the United States Supreme Court, the account was too complicated for the jury, then the trial court was under a duty to take some actions other than simply reviewing the same testimony presented to the jury. The trial court did not take any additional testimony, appoint an expert or master, or make findings of fact on each of the items presented for an accounting. This failure to take any steps above and beyond the review of testimony presented to the jury leaves the accounting fatally flawed, and the matter should be reversed and remanded.

## ARGUMENT

*"An act against the Constitution is void; an act against natural equity is void."*
James Otis, *Arguments Against the Writs of Assistance* as published in JOHN ADAMS, WORKS, VOL. II (ca: 1850-1856).

*     *     *

The term "accounting" is defined as an "adjustment of accounts of the parties and rendering for the balance ascertained to be due." 1 AM. JUR. 2D, ACCOUNTS & ACCOUNTING § 52 (West 2004). Accounting is an ancient remedy, and is generally comprised of two parts: the first part of the accounting is a determination that an accounting is appropriate under the circumstances; the second part is the taking of the account itself. 1 AM. JUR. 2D, ACCOUNTS & ACCOUNTING § 66. The initial complaint seeking an accounting generally must contain sufficient averments in order to state a cause of action for an accounting; an accounting will not be ordered simply because one is asked-for in the prayer. *Id*. at § 64; *Gulf Coast Western Oil Co. v. Trapp*, 165 F.2d 343 (10th Cir. 1947). It is the first stage of the accounting process with which this portion of Goodnight's brief is concerned; the second part of the process will be dealt with later.

This appeal arises as a result of the trial court's apparent misunderstanding of the purpose of an accounting, or the requirements in order to equitably account. As a result of the trial court's apparent misunderstanding, Appellant Goodnight has been deprived of his Constitutional right to a jury trial. This brief attempts to first address the Constitutional issues central to any prayer for an equitable accounting, and explain how, in light of the United States Supreme Court's holdings, the trial court in this case took actions tantamount to nullification of a jury verdict. Based upon these weighty Constitutional strictures, the Court of Appeals should reverse the trial court's taking of an account altogether and dismiss the accounting in its entirety.

In addition, this brief makes alternative arguments, all of which require reversal and remand of the accounting taken at the trial level. First, the trial court committed reversible error in holding that Goodnight was not entitled to an equitable accounting on his counterclaim, and therefore, as a matter of law, he was not entitled to any credits in the accounting that was had. This holding flies in the face of the equitable basis of an accounting and constitutes a grave misunderstanding of both Arkansas case law and common law. Second, the accounting taken by Judge Moody was fatally flawed in that it made no concession for the "complicated" nature of the account (if the account truly was so), and failed to take into consideration any matters not presented to the jury. The trial court did not refer the case to a master or offer items to be accounted, with opportunity for objection to those items by both parties; no findings of fact with regard to the items allowed, disallowed, or the reasons therefore were made. All of these issues require reversal of the trial court's ruling on the accounting.

### THE JUDGMENT OF THE TRIAL COURT VIOLATES GOODNIGHT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL

Amendment Seven to the United States Constitution guarantees the right to a jury trial on all counts legal in nature. U.S. Const., Amend. 7; *see Pernell v. Southall Realty*, 416 U.S. 363, 94 S.Ct. 1723 (1974). There can be little argument that a claim of fraud or deceit under Arkansas law is one entitling the defendant to a trial by jury; likewise, the Arkansas Supreme Court has recognized a defendant's right to a trial by jury in breach of fiduciary duty cases seeking money damages. *See Hames v. Cravens,* 332 Ark. 437, 966 S.W.2d 244 (1998) (Newbern, J. dissenting) (stating that although the court had not previously decided the issue, if a claim for breach of fiduciary duty seeks money damages, it entitles the defendant to a jury); *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997) (submitting both breach of fiduciary duty and fraud claims to the jury); *P.A.M. Transport, Inc. v. Ark. Blue Cross & Blue Shield*, 315 Ark. 234, 868 S.W.2d 33 (1993) (submitting fraud claims to a jury); *Interstate Freeway Srvcs., Inc. v. Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992) (submitting fraud claims to a jury).

The question becomes, when joining a prayer for accounting with legal causes of action, does the accounting present itself as a legal claim, entitling the defendant to a trial by jury, or transform the case into an equitable cause of action? The United States Supreme Court affirmatively answered that question in 1962. In

*Dairy Queen, Inc. v. Wood*, the United States Supreme Court reviewed a complaint alleging that the defendant had ceased making payments under a contract and was in breach, and that the defendant was engaging in trademark infringement. 369 U.S. 469, 82 S.Ct. 894 (1962). The plaintiff sought an accounting of any profits due to it, as well as temporary and permanent injunctions prohibiting the trademark infringement. *Id*., 82 S.Ct. 894. The trial court determined that the claims were primarily equitable in nature as a result of the prayer for accounting and injunctions, and denied the defendant's request for a trial by jury. *Id*., 82 S.Ct. 894. The defendant moved for a writ of mandamus to the trial court, and the United States Court of Appeals for the Third Circuit denied the petition. *Id*., 82 S.Ct. 894. The United States Supreme Court granted *certiorari*. *Id*., 82 S.Ct. 984.

In Justice Black's opinion, to which no dissent was filed, he looked past the mere fact that an accounting was prayed-for, but to the true substance of the complaint, saying, "[W]e think it plain that [the plaintiff's] claim for a money judgment is a claim wholly legal in its nature however the compliant is construed." *Id*. at 477, 82 S.Ct. at 899. The Court went on to say:

> The respondents' contention that this money claim is "purely equitable" is based primarily upon the fact that their complaint is cast in terms of an "accounting," rather than in terms of an action for "debt" or "damages." But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we point out in *Beacon Theatres*, the absence of an adequate remedy at

> law. *Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.*

*Id*. at 477-78, 82 S.Ct. at 899-900 (emphasis supplied).

The impact of the Court's decision was to say that in order for a court of equity to entertain jurisdiction over an accounting, without a jury, the account in question should be so complicated that a special master and a jury would be unable to examine the account with the necessary accuracy. 1 AM. JUR 2D, ACCOUNTS & ACCOUNTING § 57 (West 2004). Thus, law will not be deprived of jurisdiction over an accounting simply because the accounting contains multiple items and transactions, or because the jury would be required to examine books and records. *Id*.; *see also Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440 (7th Cir. 1984); *Sedalia v. Standard Oil Co.*, 66 F.2d 757 (8th Cir.1933), *cert. denied* 290 U.S. 706, 54 S.Ct. 374 (1934). 'Complication' as used in *Dairy Queen* means a difficulty of proof of the items in the account, without the application of remedies which are either nonexistent or patently unsuited to a trial at law, due to their juxtaposition to each other, the relationship of the parties, or the subject matter involved. 1 AM. JUR. 2D, ACCOUNTS & ACCOUNTING § 57 (citing *Ingram v. Peoples's Fin. & Thrift Co.*, 226 Ala. 317, 146 So. 822 (1933); *Bowman v. Carroll*, 91 Cal.App. 56, 266 P. 840 (1928); *Hill v. Southam*, 100 Fla. 1595, 132 So. 477 (1931)).

According to the United States Supreme Court, the circumstances are "exceptional" or "rare" in which the legal issues involving an accounting are too complicated to submit to a jury, in light of the tools available to the trial court. *Dairy Queen, Inc.*, 369 U.S. 469, 82 S.Ct. 894. The Court held in *Dairy Queen* that the claim for an accounting did not turn an otherwise legal action into an equitable one, because there was no showing that a jury could not take the accounting—the legal remedy was not inadequate. *Id*., 82 S.Ct. 894; *see also Bradshaw v. Thompson*, 454 F.2d 75 (6th Cir. 1972).

In a case of *Dairy Queen*'s progeny, *Bradshaw v. Thompson,* the United States Court of Appeals for the Sixth Circuit confronted a case very similar to the one at bar. 454 F.2d 75 (6th Cir. 1972). Bradshaw hired Thompson to sell 60 horses at the best prices available. The purchasers of the horses were to make checks payable directly to Bradshaw, who would then pay Thompson a commission out of the proceeds. *Id*. In turn, and apparently without the knowledge of Bradshaw, Thompson hired two other men, Brandon and Martin, to sell the horses. *Id*. Despite the parties' agreement, some of the horses were sold on credit, some in exchange for checks payable to Thompson, some were given away to others who helped sell the horses, some were traded to third parties in exchange for other horses, some were sold directly to Thompson and Brandon, and some were sold at auction and bought by Thompson and Brandon. *Id*. Thompson could produce no records of any of these transactions, other than a few bank slips. *Id*.

Bradshaw sued in federal court, alleging, *inter alia*, that Thompson had breached his fiduciary duties to Bradshaw and that Thompson had defrauded Bradshaw. *Id*. The matter was tried to a jury on both liability and damages. The court refused to take an equitable accounting without a jury, and Bradshaw appealed claiming error on that basis. *Id*. Citing *Dairy Queen*, the Sixth Circuit stated that "the existence of an agency relationship does not automatically entitle the principal to an accounting, nor does a prayer for an accounting automatically take the case away from the jury." *Id*. at 78. The court went on to say:

> Unless there is such a complication of accounts that it is difficult for the machinery of the law court to cope with them, the principal ordinarily cannot bring an action in equity for money due; if his remedy otherwise would be solely in the courts of law, he cannot bring an action for an account merely on the ground of the agency relation.

*Id*. (quoting RESTATEMENT OF AGENCY § 399(e), cmt.). Alleging a remedy cognizable in equity will not justify depriving a defendant of his right to a trial by jury on legal issues. *Id*.; *see Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961).

The Sixth Circuit determined that an accounting is nothing more than a "species of disclosure" based upon the inability of the plaintiff to determine how much money, if any, is due him or her from the defendant. *Bradshaw*, 454 F.2d

75. Of central importance in deciding if an accounting should be taken by the court without a jury is whether ordinary discovery will suffice. *See id*. The availability of liberal discovery procedures under the Federal Rules of Civil Procedure has made legal remedies far more "adequate" than under prior law. *Id*. Thus, the Sixth Circuit pointed out that Bradshaw obtained through discovery all of the information which he could have obtained by the court conducting an accounting. *Id*. Bradshaw had obtained in discovery information regarding the disposition of each horse and the consideration given. *Id*. Thus, an accounting would have provided little benefit above and beyond the jury's determination. *See id*. For the reasons discussed below, *Bradshaw* is strikingly similar to, and dispositive of, the issues raised in this case.

***The trial court made no finding that the Bostics' remedy at law was inadequate, and, indeed, their remedy was adequate.***

Although a host of problems surrounds the improper accounting performed by the court in this case, the end result of the comedy of errors that transpired was to deprive Goodnight of his right to a trial by jury. The trial court made its ruling on whether or not to conduct an accounting at the end of the presentation of evidence, but before the matter was submitted to a jury. (R. 1007-08) (App. A 8, 17). The trial court's decision that an accounting was proper in this case is a legal conclusion. On appeal, legal conclusions are reviewed *de novo*. *See In re Usery*, 123 F.3d 1089 (8th Cir. 1997). It appears from the record testimony that the court was quite confused as to what to do with the accounting request. (R. 971-74) (App. A 16). Plaintiffs' counsel argued that the accounting was essentially equitable in nature and required the court to consider the matter without a jury. Counsel for Goodnight objected and argued that the accounting was part and parcel to the claim for breach of fiduciary duty, which was being submitted to the jury with Plaintiffs' consent. Thus, to allow the same claim for breach of fiduciary duty to go both to the judge and jury would result in the civil equivalent of double-jeopardy for Goodnight. (R. 971, 973-4) (App. A 16).

The trial court, without much of a ruling from the bench, apparently decided to submit the breach of fiduciary duty claim *both* to the jury and also to the court for an accounting. Judge Moody, in instructing the jury, told them they were to consider the breach of fiduciary duty claim and award damages based upon a breach of fiduciary duty, if one occurred, but then instructed them not to consider any damages for "self-dealing." (R. 1007-08) (App. A 17). Nowhere in the jury instructions did the court attempt to differentiate between what transactions or allegations were "self-dealing," and the court did not define that term as used in the jury instructions. (*See* R. 996-1018) (*See* App. A 17).

A request for equitable accounting requires the plaintiff to plead his or her cause of action with reasonable specificity. 1 AM. JUR. 2D, ACCOUNTS AND ACCOUNTING § 64; *Gulf Coast Western Oil Co.*, 165 F.2d 343. A mere prayer for accounting is insufficient to warrant one being ordered. 1 AM. JUR. 2D, ACCOUNTS & ACCOUNTING § 64. Thus, the court should turn its attention to what was pleaded by Plaintiffs in their Complaint and subsequent amendments. Nowhere is a cause of action for 'self-dealing' alleged as a derivative suit or otherwise. Goodnight submits to this Court that 'self-dealing' is not a cause of action in-and-of itself, but is merely an allegation that would help substantiate a cause of action for breach of fiduciary duty. Any alleged 'self-dealing' in this action was part of Plaintiffs' breach of fiduciary duty derivative claim.

After the jury returned a verdict in favor of Plaintiffs on both the deceit claim and the breach of fiduciary duty claim, but awarded Plaintiffs $0 in damages for both, the court then conducted its own accounting, based upon the *same* finding of breach of a fiduciary duty. (App. A 9). The court, did, in fact, submit the same cause of action to both the jury and the judge, which resulted in Plaintiffs having two bites at the same apple. In essence, the judge took a verdict by the jury, disagreed, and nullified the verdict under the auspices of an "accounting."

Moreover, the trial court, in making its determination that an accounting was appropriate, did not apply the correct standard. The trial court in its order for accounting relied upon a case from the Arkansas Court of Appeals, *A&P's Hole-in-One*. The court believed that case stood for the proposition that an equitable accounting was appropriate whenever (1) a fiduciary relationship existed between the parties, and (2) the fiduciary had not accounted. *A&P's Hole-in-One v. Moskip*, 38 Ark.App. 234, 832 S.W.2d 860 (1992). (App. A 9). As discussed in more detail below, the trial court misunderstood the holding of *A&P's Hole-in-One*. But nevertheless, the clear directive of the United States Supreme Court and the highly persuasive precedent from the Sixth Circuit make very clear that the court can only perform the accounting without a jury if the court *first determines* that the matter is so complicated the jury could not digest the evidence, leaving no adequate remedy at law. This is the *only* appropriate circumstance for the court to take an accounting.

Nowhere in the record were Plaintiffs required to make a showing that there was no adequate remedy at law. (*See* R.). Nowhere in the trial court's order allowing the accounting does the trial court consider whether or not the jury could hear the evidence and provide a remedy. (App. A 9). This, in and of itself, constitutes a misapplication of the law, which must be reversed.

***Plaintiffs waived their request for money damages from an accounting by permitting the jury to assess money damages based upon breach of fiduciary duty.***

Plaintiffs' verdict forms, and the jury instructions given by the trial court, required the jury to find whether or not Goodnight had breached a fiduciary duty to Goodnight Farms, and to award Goodnight Farms money damages resulting from any breach. The jury found a breach of Goodnight's duties, and awarded

Goodnight Farms $0 in damages. (App. A 8, 9). Plaintiffs raised no objection to this procedure.

Waiver is the intentional conduct inconsistent with claiming a known right. *Lesikar v. Rappeport*, 33 S.W.3d 282 (Tex.App.Texarkana 2000). Plaintiffs knew that the jury would take their breach of fiduciary duty claim and decide it at the time the jury instructions were given and the verdict forms were submitted. By not raising any objection to that claim going to the jury, Plaintiffs waived any right to any subsequent additional monetary award. It defies the basic precepts of equity to allow the matter to go to the jury, and then allow the matter to be re-tried to the judge, just because the plaintiff is not happy with the jury's determination.

The jury found that Goodnight Farms had not suffered any damages as a proximate result of any breach of Goodnight's fiduciary duties to the company. The longstanding rule is that a determination by a jury will be given greater weight than a determination made by the court sitting without a jury. *Clark v. Isaacs*, 182 Ky. 391, 206 S.W. 606 (1918) (holding that an equitable accounting is only appropriate where the issues are too complicated for submission to a jury). Whether intentionally or unintentionally, by agreeing to allow the fiduciary duty derivative claim to be given to the jury, Plaintiffs have waived any right to have the judge award monetary relief. Based upon Plaintiffs' waiver, the accounting conducted by the trial court must be reversed and dismissed.

**THE COURT ERRED IN HOLDING THAT GOODNIGHT WAS NOT ENTITLED TO AN ACCOUNTING, AND WAS THEREFORE NOT ENTITLED TO ANY CREDITS IN THE ACCOUNTING**

The United States Court of Appeals for the Eighth Circuit has long endorsed the maxim *'He who seeks equity should do equity'* in accounting actions. *Broatch v. Boysen*, 236 F. 516, 519-20 (8th Cir. 1916). Although all accountings are not equitable (*i.e.* the accounting may be ordered and submitted to a jury), the basis of an equitable accounting is the *equity* involved—the premise of an equitable accounting is to decree "absolute justice between the parties." *Fincham v. A.U. Pinkham & Co.*, 133 Wash. 517, 521, 233 P. 913, ___ (1925). According to the Washington Supreme Court, denial of an "ample opportunity [of the parties] to develop the full truth" of the account is a denial of a substantive right. *Id.*, 233 P. at ___.

This becomes important in the context of, first, who is entitled to an accounting, and second, how to conduct the equitable accounting when one is found necessary. As already discussed, the first step in the two-step process is for the court to find that an equitable accounting is warranted under the circumstances; once that decision is made, the court may then proceed in taking the accounting. 1 AM. JUR. 2D, ACCOUNTS & ACCOUNTING § 66 (West 2004); *see Fincham*, 133 Wash. 517, 233 P. 913. The Arkansas Supreme Court has looked at the nature of an equitable accounting in considering the pleading requirements of the parties.

*See Tankersley v. Patterson*, 176 Ark. 1013, 5 S.W.2d 309 (1928). In *Tankersley*, the Arkansas Supreme Court was presented with an accounting taken by the trial court which allowed as 'accountable' items those items requested by the parties in their pleadings. In addition, the trial court allowed additional items in favor of the defendant not pleaded by either party. *Id*., 5 S.W.2d 309. In holding that this procedure was correct, the Arkansas Supreme Court noted that all of the transactions considered by the court in favor of both parties were transactions arising out of the partnership being accounted. It was thus proper to consider those transactions, regardless of whether a particular party, or any party, asked for them. *Id*., 5 S.W.2d 309.

*Tankersley* stands for the proposition that the equitable precepts underlying an equitable accounting require that—once an accounting is deemed appropriate under the circumstances of the particular case—the court gather *all* transactions for the account, both debits and credits, and put them together to ascertain any balance due. *See id*., 5 S.W.2d 309. The key is that the transactions relate to the account or business being accounted, not that one party or the other asked for them to be accounted, *et cetera*. *See id*., 5 S.W.2d 309; *see also Scott v. Stephenson*, 168 Ark. 763, 271 S.W. 714 (1925) (allowing the defendant in an accounting action credit for items, including items worn out in the ordinary course business). The Supreme Court of Washington, similarly, has considered this issue, and determined that once an accounting is ordered, *both sides are automatically entitled to credits and debits*, saying:

> The mere filing of a bill for accounting implies that *there were items on both sides*, that the balance is uncertain, and that the true amount and to whom due must be ascertained by the court. *It further implies an offer of the complainant's part to pay any balance that might be found owing to the defendant,* without a specific averment of an offer to that effect. This is necessary to enable the court to do complete justice between the parties. *Both parties are regarded as actors by the act of filing the bill*, the register must state the full account between them, and the court must pass upon it, declaring their respective rights by a final decree.

*Wester v. S. Seattle Land Co.*, 174 Wash 276, 286, 24 P.2d 633, 637 (1933) (quoting the Alabama Supreme Court in *Grand Bay Land Co. v. Simpson*, 205 Ala. 347, 87 So. 186 (1921)) (emphasis supplied). To order an equitable accounting but not allow the defendant credits towards the accounting is not to do "complete justice between the parties." *See, e.g., id.*, 24 P.2d 633.

The general rule that affirmative relief cannot be granted to a defendant without a cross-bill or counterclaim simply does not apply to actions for an equitable accounting. 1 AM. JUR. 2D, ACCOUNTS & ACCOUNTING § 65; *see U.S. v. Norwegian Barque "Thekla,"* 266 U.S. 328, 45 S.Ct. 112 (1924). In this case, the trial court did exactly the opposite, and took all credits toward the account in favor of the Bostics, but denied any credits in favor of Goodnight, based upon a finding that Goodnight was not entitled to an accounting on his counterclaim. (App. A 11).

At the pleadings stage, Plaintiffs prayed for an accounting of the business in their Complaint and various amendments. (App. A. 1, 2, 5). Goodnight filed a Counterclaim and amendments thereto, also seeking an accounting of the business assets. (App. A 3, 6). Goodnight requested that he be given credit for items contributed to the corporation. (*See* App. A 11). The trial court, however, decided that Plaintiffs were entitled to an equitable accounting, but Goodnight was not. (App. A 11). The trial court's determination that Goodnight was not entitled to an accounting is a legal conclusion and should be reviewed *de novo* on appeal. *See In re Usery*, 123 F.3d 1089. This determination was based upon the trial court's erroneous interpretation of *A&P's Hole-in-One*, discussed in more detail below. Nevertheless, the court held that, because the Plaintiffs were entitled to an accounting, all credits to the account proposed by them should be considered, if appropriate. But, because Goodnight was not entitled to an accounting, the court held that none of the items proposed as credits by him should be considered. (App. A 11).

This holding is against the great weight of the case law, constitutes an error of law, and requires reversal and remand for consideration of the *entire* account of Goodnight Farms. It is not 'who is entitled to have an accounting' that determines the items that go into the account—it is the fact that an accounting is ordered. The pleadings of the parties serve only as a basis for the court to determine whether or not to *take* the accounting. Once that first step is overcome and one is ordered, the parties both become 'actors' in the accounting, and all credits and debits of the account must be pooled to determine the balance due, if any. By requesting the accounting, the Bostics agreed to have all debits against them included in the accounting process; they agreed to pay any balance due against them, if one was found. It was not necessary for Goodnight to set up any matters by a counterclaim once the accounting was ordered.

The equity involved in the accounting mitigated in favor of including all matters properly proven by either party. Failure of the court to do so was an error of law which requires reversal and remand. In addition, the trial court misunderstood the holding of *A&P's Hole-in-One* as discussed below.

***The Trial Court Misunderstood the Holding of* A&P's Hole-in-One, *and That Case is No Longer Constitutionally Sound***

In reaching its final conclusion in this lawsuit, the trial court relied almost exclusively upon the Arkansas Court of Appeals' decision in *A&P's Hole-in-One, Inc. v. Moskip*. 38 Ark.App. 234, 832 S.W.2d 860 (1992). In this court's *de novo* review of the trial court's legal conclusions, a reversal is appropriate if the trial court misunderstood or misapplied the law. *See In re Usery*, 123 F.3d 1089.

In *A& P's Hole-in-One*, the Arkansas Court of Appeals in that case seemed to say that an accounting could be conducted whenever a fiduciary had been entrusted with property of another, so that the fiduciary would be made to answer for his actions with regard to the property. *Id*., 832 S.W.2d 860. The court also seemed to say that the mere existence of a fiduciary relationship was enough to confer equitable jurisdiction for an accounting. *Id*., 832 S.W.2d 860. Finally, the court determined that where a fiduciary is in possession of records, then it is his or her duty to show that the records were properly kept. *Id*., 832 S.W.2d 860.

The first notable problem with the holding in *A&P's Hole-in-One* is that it flies directly in the face of the United States Supreme Court's decision in *Dairy Queen*: the existence of a fiduciary relationship will not, *by itself*, divest the defendant of his or her right to a jury trial in an action that seeks monetary relief. *Dairy Queen, Inc.*, 369 U.S. 469, 82 S.Ct. 894 (1962). *Contra*, *A&P's Hole-in-One, Inc.*, 38 Ark.App. 234, 832 S.W.2d 860. But nowhere in the opinion in *A&P's Hole-in-One* is *Dairy Queen* cited or discussed. *See, A&P's Hole-in-One, Inc.*, 38 Ark.App. 234, 832 S.W.2d 860. Instead, the Arkansas Court of Appeals relied primarily upon a 1910 holding of the Arkansas Supreme Court in *Red Bud Realty Co. v. South* and a 1950 holding of the Arkansas Supreme Court in *Walters-Southland Inst. v. Walker*. *A&P's Hole-in-One, Inc.*, 38 Ark.App. 234, 832 S.W.2d 860 (citing *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S.W. 340 (1910); *Walters-Southland Inst. v. Walker*, 217 Ark. 602, 232 S.W.2d 448 (1950)). The decisions in both *Red Bud Realty* and *Walters-Southland* were handed-down prior to the United States Supreme Court's ruling in *Dairy Queen*. Thus, it appears that no one at the Arkansas Court of Appeals cited or discussed *Dairy Queen*, and the Court of Appeals did not consider that case's applicability to the issue now at hand. *A&P's Hole-in-One* cannot be considered without the strictures of the United States Supreme Court's decision in *Dairy Queen*.

The second seminal misunderstanding of the trial court in this case was the applicability of the holding in *A&P's Hole-in-One* to Goodnight's right to have the *entire* business account considered, rather than only specific transactions proffered by the Bostics. The trial court apparently considered the holding in *A&P's Hole-in-One* that the 'fiduciary should be made to account' to mean that only the *fiduciary's* actions toward the account should be considered, but not any other items potentially belonging in the business account. (App. A 11). This holding is error. As the Washington, Alabama, and even the Arkansas Supreme Courts have previously decided, once the plaintiff opens the Pandora's box of an "accounting" all of the business transactions are to considered, and the plaintiff has tacitly consented to a judgment against him or her if a balance is found to be due in favor of the defendant after all of the business transactions have been gathered and reviewed. This is the only way that an accounting could ever be said to have done 'equitably.'

This is not to say that the Bostics were entitled to an equitable accounting in the first instance. As already discussed, the claims against Goodnight were legal in nature, sought only money damages, and there was absolutely no averment by the Bostics or finding by the court that legal remedies were inadequate in this case.

But based upon the assumption that an accounting was appropriate in the first instance (denied by Goodnight) the manner of taking the accounting was conducted improperly. The trial court could not, as it apparently attempted to do, allow all credits in favor of the Bostics (unless Goodnight could disprove them) and give Goodnight no credits towards the account. The court seemed to say that the Bostics were not fiduciaries of Goodnight, and therefore he was not entitled to an accounting. (App. A 9, 11). Because he was not entitled to an accounting against them, said the trial court, no credits proposed by Goodnight should be considered in settling the business's account. This was not at all the holding of *A&P's Hole-in-One*, but was merely the trial court reading the language of that case too literally. That case did not address Goodnight's issue presented in this case, and did not decide that issue. The court simply misunderstood the holding of the Arkansas Court of Appeals, and must be reversed. For all of these reasons, the trial court's order on the accounting should be reversed and remanded for further consideration.

**THE ACCOUNTING TAKEN IN THIS CASE WAS FATALLY FLAWED, BECAUSE THE COURT DID NOT UNDERTAKE ANY ACTIONS OTHER THAN REVIEWING THE SAME TRIAL TESTIMONY PRESENTED TO THE JURY, DID NOT GRANT A REFERENCE TO A MASTER, AND DID NOT MAKE FINDINGS OF FACT ON CREDITS AND DEBITS.**

Equitable accounting is a long-running equitable doctrine, not often used in modern law due to the more-readily available legal precepts and remedies. *See, e.g., Dairy Queen, Inc.*, 369 U.S. 469, 82 S.Ct. 894. However, the courts that have passed on what is required when an equitable accounting is taken have offered some guidance. Because the basis of an equitable accounting is essentially the inability of a jury, utilizing ordinary discovery procedures, to understand the account due to its complexity, many courts have determined that an equitable accounting requires the appointment of a special master to prepare the accounting. *Walters-Southland Inst.*, 217 Ark. 602, 232 S.W.2d 448; *Whann v. Doell*, 192 Cal. 680, 221 P. 899 (1923); *see Dairy Queen, Inc.*, 369 U.S. 469, 82 S.Ct. 894; *Dahlberg v. Fisse*, 328 Mo. 21, 40 S.W.2d 606 (1931); *Harmon Care Centers, Inc. v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983).

The Arkansas Supreme Court has held, prior to *Dairy Queen*, that where complicated accounts are to be accounted-for, justice "cannot be done" without the reference to a master.[4] *Walters-Southland Inst.*, 217 Ark. 602, 232 S.W.2d 448.

[4] It is important to note that this case was decided prior to the United States Supreme Court's holding in *Dairy Queen* that accountings should only be tried to the court without a jury where the account is too complicated for the jury to understand. *See Dairy Queen, Inc.*, 369 U.S. 469, 82 S.Ct. 894. In *Walters-Southland*, the Arkansas Supreme Court stated that simple accountings could be taken by the chancellor, but complicated accountings required a master. *Walters-Southland Inst.*, 217 Ark. 602, 232 S.W.2d 448. The Arkansas court's holding with respect to permitting equitable accountings without a jury seems to have been tacitly overruled by *Dairy Queen*. *Dairy Queen, Inc.*, 369 U.S. 469, 82 S.Ct. 894.

The California Supreme Court agrees. In *Whann v. Doell*, the California court was faced with an appeal from a chancellor's decision on an equitable accounting. The chancellor awarded a judgment in favor of the plaintiff after taking the account himself. He did not refer the case to a master, and did not make findings of fact on the specific items of the account in favor or against either party. *Whann*, 192 Cal. 680, 221 P. 899. According to the California Supreme Court, this was improper. *Id*., 221 P. 899. That court said:

> It is obvious that a statement of the balance due in the findings of the court, without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of such an action, because the issues between the parties are not framed or disposed of in such manner as to show the method by which the general result is reached, and the aggrieved party cannot successfully present his grievances to an appellate tribunal…

*Id*. at 684, 221 P. at 901. The California court determined that the findings of fact with regards to the items allowed or disallowed in the accounting are not required to be stated in accepted bookkeeping fashion, but must be given in sufficient clarity to determine the items accounted and the disposition of those items. *Id*., 221 P. 899.

Goodnight's case presents the same problems. When the court 'performed' the accounting, it pronounced a balance due from Goodnight, but made no findings of fact whatsoever as to what items were included in the accounting, the court's disposition on each item presented, or the basis for including or excluding the items. From this, the parties and this Court of Appeals can only surmise what was or was not included in the accounting and what was or was not allowed as debits and credits.

Even more troublingly, though, is the court's treatment of the accounting after the jury returned its verdict. The jury was clearly given the cause of action for breach of fiduciary duty and allowed to determine whether there was a duty, a breach, and proximately-related damages on that cause of action. (R. 996-1018) (App. A 8, 17). The jury determined that there was a duty and a breach, but determined that there were no damages to be awarded as a result. (App. A 8).

Now, assuming the court was properly to perform the accounting (which Goodnight disputes), that determination should be predicated upon the basis that the jury could not adequately comprehend the accounting with the assistance of the parties and the court. The account would have been too complicated. So what did the court do to remedy this 'complicated' problem? Nothing. The court merely reviewed the *exact same* testimony and exhibits presented to the jury. It did not refer the matter to a master for a taking of the account, as the court would have been obliged to do under Federal Rules of Civil Procedure 53.[5] It did not take any

[5] Federal Rules of Civil Procedure 53 provides, in pertinent part:
**(a) Appointment.** (1) Unless a statue provides otherwise, a court may appoint a master only to:

additional testimony, discovery, or review any additional documentation. The court never requested the parties to compile a list of the items, which they each wished included in the accounting, and never submitted those lists to the other parties for objections.

If the account was truly complicated to such a degree that a jury could not consider the matter, then it was imperative that the trial court take some *additional steps* to ensure the account was properly taken. Goodnight submits that such steps would have included allowing an additional period of discovery and appointment of a master with special accounting expertise to assess the transactions of the business and make a recommendation on how to reconcile the account. The court then should have allowed each party the opportunity to make objections to the master's accounting, and the court should have ruled on each objection, stating a final account in its order and judgment. As taken, however, the actions of the court amounted to no more than a review of the trial testimony, clearly presented to the jury, and the reaching of a different decision based upon the same information. The trial court's decision to conduct an accounting without taking measures in addition to reviewing the testimony presented to the jury was a conclusion of law,

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(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
(ii) the need to perform an accounting or resolve a difficult computation of damages…

which this court should review *de novo*. *See In re Usery*, 123 F.3d 1089. This amounted to no more than jury nullification, and must be reversed and remanded as improper.

FED. R. CIV. P. 53(a).

## CONCLUSION

In conclusion, Goodnight believes that the trial court's actions in taking the accounting after the jury verdict was rendered essentially deprived Goodnight of any benefit, right, or entitlement to have the claims against him decided by a jury of his peers. The United States Supreme Court has at least once stated that this is impermissible in the absence of a specific finding that the account is simply too complicated for the jury. By doing nothing more than reviewing the same testimony presented to the jury, the trial court's alleged 'accounting' is evidence that the matter was sufficiently clear for presentation to the jury, and amounts to nothing more than impermissible jury nullification.

In the alternative, Goodnight submits that the trial court made a serious error of law when it held that, under *A&P's Hole-in-One*, if Goodnight was not entitled to have an accounting performed, then he is not entitled to any credits when the Plaintiffs' requested accounting is performed. This is a grave misunderstanding of Arkansas case law. In addition, that law is not in accordance with United States Supreme Court authority, as interpreted by the trial court.

Finally, and in the alternative, Goodnight believes the accounting process itself was flawed. If the basis of the accounting was that the account was too complicated for the jury, it was incumbent upon the trial court to take additional steps to divine the account. The trial court did not appoint an expert or a master, and did not make any findings of fact on the items presented for the accounting, with the disposition of each item. The trial court did no more than review the exact same testimony presented to the jury.

As a result of these grievous errors, the accounting taken by the trial court should be reversed and dismissed. In the alternative, the trial court's decision should be reversed in-part as to the accounting and remanded for further proceedings.

WHEREFORE, Appellants Goodnight and Goodnight Farms respectfully request that this honorable Court of Appeals reverse the trial court's accounting, or in the alternative, reverse the accounting and remand, award Appellants their costs on appeal, and grant them any and all other just and proper relief.

Respectfully submitted,

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## CERTIFICATES

### *Certificate of Compliance*

I, Krystal Taylor, hereby certify that this brief complies with the type-volume limitation of FRAP 32(a)(7), containing 9,482 words, and complies with the type-face requirements of FRAP 32(a)(5) and type-style requirements of FRAP 32(a)(6), as this brief has been prepared in a proportionately-spaced typeface using Microsoft Word®, version 2002, in Times New Roman 14-point font.

*/s/ Krystal Taylor*
Krystal Taylor

Dated: July 26, 2005

### *Certificate of Service*

I, Krystal Taylor, hereby certify that I have sent via U.S. Mail, postage pre-paid, two copies each of the forgoing document and one copy each of Appendix A and Appendix B to the following persons, on this the 27th day of July, 2005:

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*/s/ Krystal Taylor*
Krystal Taylor

## ADDENDUM

| ***Document*** | ***Tab*** |
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